

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO**

ZURICH AMERICAN INSURANCE, ET
AL.,

Plaintiffs,

V.

LORD ELECTRIC CO. OF PUERTO RICO, ET AL.,

Defendants.

Civil No. 09-1111 (SEC)

OPINION AND ORDER

Before the Court are defendants Rimco Inc. (Rimco) and Electrical Testing Services' (ETS) motions for summary judgment (Dockets # 327 & 328), the plaintiffs' consolidated opposition thereto (Docket # 337), and Rimco and ETS's replies (Dockets # 350 & 352). Because genuine issues of material fact preclude resolution via summary judgment, these motions are **DENIED**.

Standard of Review

The Court may grant a motion for summary judgment if the “movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a); Kelley v. Correctional Medical Services, Inc., 707 F.3d 108, 155 (1st Cir. 2013). At this stage, it is axiomatic that courts “may not weigh the evidence,” Casas Office Machs., Inc. v. Mita Copystar Am., Inc., 42 F.3d 668 (1st Cir. 1994), but must construe the record in the “light most flattering” to the nonmovant. Soto-Padro v. Public Bldgs. Authority, 675 F.3d 1 (1st Cir. 2012). Courts must similarly resolve all reasonable inferences in favor of the party opposing summary judgment. Id.

Because the summary judgment inquiry is grounded in the factual evidence available, one of its principal purposes “is to isolate and dispose of factually unsupported claims or

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2 defenses.” Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). The Court may therefore
 3 consider “depositions, documents, electronically stored information, affidavits or declarations,
 4 stipulations (including those made for purposes of the motion only), admissions, interrogatory
 5 answers, or other materials” Fed. R. Civ. P. 56(c)(A). Inadmissible evidence, such as
 6 hearsay evidence considered for the truth of the matter asserted, is excluded at this stage.
Hannon v. Beard, 645 F.3d 45, 49 (1st Cir. 2011).

7 Once the party moving for summary judgment has established an absence of material
 8 facts in dispute, and that judgment is proper as a matter of law, the burden shifts to the non-
 9 movant to “affirmatively point to specific facts that demonstrate the existence of an authentic
 10 dispute.” Kenney v. Floyd, 700 F.3d 604, 608 (1st Cir. 2012) (internal quotation marks omitted);
Garside v. Osco Drug, Inc., 895 F.2d 46, 48 (1st Cir. 1990). “A factual issue is ‘genuine’ if ‘it
 11 may reasonably be resolved in favor of either party and, therefore, requires the finder of fact to
 12 make ‘a choice between the parties’ differing versions of the truth at trial.’” DePoutout v.
Raffaelly, 424 F.3d 112, 117 (1st Cir. 2005) (quoting Garside, 895 F.2d at 48). A material fact,
 13 in turn, is one that may affect the outcome of the suit under the governing law. Maymí v. P.R.
Ports Auth., 515 F.3d 20, 25 (1st Cir. 2008). The non-movant may not rest on conclusory
 14 allegations and improbable inferences. Shafmaster v. U.S., 707 F.3d 130, 135 (1st Cir. 2013);
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). Neither “effusive rhetoric,” Cadle
Co. v. Hayes, 116 F.3d 957, 960 (1st Cir. 1997) nor “arguments woven from the gossamer
 15 strands of speculation and surmise,” RTR Technologies, Inc. v. Helming, 707 F.3d 84, 93 (1st
 16 Cir. 2013), suffice to forestall the entry of summary judgment. In short, the non-movant must
 17 “point to competent evidence and specific facts to stave off summary judgment.” Tropigas de
P.R., Inc. v. Certain Underwriters at Lloyd’s of London, 637 F.3d 53, 56 (1st Cir. 2011). Failure
 18 to shoulder this burden, “allows the summary judgment engine to operate at full throttle.”
Lawton v. State Mut. Life Assur. Co., 101 F.3d 218, 223 (1st Cir. 1996).

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2 **Applicable Law and Analysis**

3 It should go without saying that, in diversity cases such as this one, state law governs the
4 substantive outcome. Erie R.R. Co. v. Tompkins, 304 U.S. 64, 78 (1938); Essex Ins. Co. v.
5 BloomSouth Flooring Corp., 562 F.3d 399, 403 (1st Cir. 2009). This action arises in the “field
6 of torts,” which in turn is controlled—“[b]oth in form and in content—by the civil law system.”
7 Valle v. American International Insurance Co., 8 P.R. Offic. Trans. 735, 736, 108 P.R. Dec.
8 692, 695 (1979) (Trías, C.J.). In turn, Article 1802 establishes that a “person who by an act or
9 omission causes damage to another through fault or negligence shall be obliged to repair the
10 damage so done.” P.R. Laws Ann. tit. 31, § 5141. A claimant seeking relief under this article
11 must establish “(1) a negligent act or omission, (2) damages, and (3) a causal relationship
12 between them.” Soc. Gananciales v. Padín Co., Inc., 17 P.R. Offic. Trans. 111, 117 P.R. Dec.
13 94 (1986). The scope of negligence under Article 1802 is broad—as broad as the behavior of
14 human beings... includ[ing] any fault that causes harm or injury.” Bonilla v. Chardón, 18
15 P.R. Offic. Trans. 696, 709, 118 P.R. Dec. 599 (1987) (quoting Colón v. Romero-Barceló, 112
16 P.R. Dec. 573, 579 (1982)). Nevertheless, the existence of an injury or damages alone is not
17 grounds for liability under Article 1802. A defendant will be liable only for those reasonably
18 foreseeable consequences associated with his acts or omissions. Wojciechowicz v. United
19 States, 576 F. Supp. 2d 241, 270-72 (D.P.R. 2008) (citing De-Jesus-Adorno v. Browning Ferris
20 Industries of Puerto Rico, Inc., 160 F.3d 839, 842 (1st Cir. 1998)), aff’d, 582 F.3d 57 (1st Cir.
21 2009)

22 Regarding a defendant’s omissions, those “that generate[] liability under Article 1802
23 happen [] when ‘the law imposes a duty of care requiring the defendant to conform to a certain
24 standard of conduct for the protection of others against unreasonable risk.’” Zabala-Calderón
25 v. U.S., 616 F. Supp. 2d 195, 199 (D.P.R. 2008). The duty of care may arise in one of three
26 ways: “(1) by a statute, regulation, ordinance, bylaw, or contract; (2) as the result of a special

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2 relationship between the parties that has arisen through custom; or (3) as the result of a
 3 traditionally recognized duty of care particular to the situation.” De-Jesus-Adorno, 160 F.3d
 4 842. Moreover, “the duty is defined by the general rule that one must act as would a prudent and
 5 reasonable person under similar circumstances.” Vázquez-Filippetti v. Banco Popular de Puerto
 6 Rico, 504 F.3d 43, 49 (1st Cir, 2007) (citing Ortíz v. Levitt & Sons of P.R., Inc., 1 P.R. Offic
 7 Trans. 407, 101 P.R. Dec. 290 (1973)). Although the duty of care calls for the anticipation of
 8 reasonably probable injuries to probable victims, Marshall v. Pérez Arzuaga, 828 F.2d 845, 847
 9 (1st Cir. 1987), “the foreseeability required under [Article] 1802 does not extend to all
 10 imaginable effects resulting from defendant’s conduct. This would be tantamount to turning the
 11 defendant into an absolute insurer of its acts and omissions.” Wojciechowicz, 576 F. Supp. 2d
 12 at 272. Therefore, a person breaches the duty of reasonable care only when his actions create
 13 reasonably foreseeable risks. Vazquez-Filippetti, 504 F.3d 43, 49.

14 With these principles in mind, the Court turns to the facts of this case. As to Rimco’s
 15 motion for summary judgment, the short answer is that the plaintiffs have shouldered their
 16 summary-judgment burden of showing that genuine issues of material facts exist as to whether
 17 Rimco was responsible for inspecting and maintaining the “day tanks” that malfunctioned —
 18 the apparent short-term cause of the spill. Accord Wells Real Estate Inv. Trust II, Inc. v.
 19 Chardón/Hato Rey P’ship, S.E., 615 F.3d 45, 58 (1st Cir. 2010). Specifically, insofar as Rimco’s
 20 affidavits contradict the deposition testimony of the building engineers that “choice cannot be
 21 made under the banner of summary judgment.” Mandel v. Boston Phoenix, Inc., 456 F.3d 198,
 22 207 (1st Cir. 2006) (citation and internal quotation marks omitted). It is, moreover, incumbent
 23 upon the jury — and not this court — to discard (or adopt), based on the alleged contradictions
 24 in his deposition testimony, the conclusions reached by plaintiff’s expert. See
 25 Quiñones-Pacheco v. Am. Airlines, Inc., 979 F.2d 1, 5 (1st Cir. 1992) (“In their deliberations,

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2 jurors are permitted to draw reasonable inferences from the evidence and to assess the
 3 credibility of witnesses, including expert witnesses.”).

4 Finally, Rimco’s undeveloped argument (in a footnote, see Docket # 327, p. 2 n. 1) that
 5 the plaintiffs have “change[d] their liability theory” is way off the mark. As properly argued by
 6 the plaintiffs, a perfunctory review of the complaint, see Docket # 1, p. 11, shows that the
 7 averments against Rimco included an allegation regarding the disconnected “vent valve” from
 8 the “day tanks” in question. Accordingly, the complaint contains “the necessary factual
 9 averments . . . with respect to each material element of the underlying legal theory . . .”
 10 Fleming v. Lind-Waldock & Co., 922 F.2d 20, 24 (1st Cir.1990). Compare Rios v. Municipality
 11 of Guaynabo, No. 10-1293, 2013 WL 1497287, at *12-13 (D.P.R. Apr. 12, 2013) (to be
 12 published in F.Supp.2d). No more is needed to deny Rimco’s request for summary judgment.

13 The same conclusion follows with respect to ETS’s motion for summary judgment. ETS
 14 argues that it (1) “follow[ed] its duty of care to prevent dust from contaminating the transformer
 15 before it was re-energized on February 9, 2008”; (2) “vacuumed the Transformer to prevent dust
 16 contamination before it was re-energized”; and (3) followed Federal Pacific’s Instruction
 17 Manual. Docket # 328, pp. 8-10. Maybe so. But these fact-based defenses clearly implicate the
 18 weighing of the evidence, and a trial is the proper arena to gauge a witnesses’ credibility. See
 19 Coyne v. Taber Partners I, 53 F.3d 454, 457 (1st Cir.1995). The upshot is that the argument that
 20 the plaintiffs lack evidence to prove ETS’s alleged negligence is without merit. Here, the
 21 summary-judgment record shows that plaintiffs’ expert determined that the transformer’s
 22 malfunction was caused by ETS’s failure to properly clean the transformer. See Docket # 337-4,
 23 p. 24.¹ And the plaintiffs have come forward with competent evidence to create a triable issue

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25 ¹ ETS’s contention that Albert Rose’s expert report “may not be considered when ruling on the
 26 Motion for Summary Judgment because it is not subject to penalty of perjury,” Docket # 350, p. 3 is
 unavailing. Rose’s deposition, in which ETS’s counsel participated, see Docket # 337-17, p. 11:20-23,

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2 regarding the reasonableness vel non of the maintenance ETS provided to the transformer. See,
 3 e.g., Vázquez-Filippetti v. Banco Popular de Puerto Rico, 504 F.3d 43, 49 (1st Cir. 2007). “So
 4 a judge cannot decide that issue on summary judgment unless the reasonableness or
 5 unreasonableness of what a party did or did not do is beyond dispute.” Candelario Del Moral
 6 v. UBS Fin. Servs. Inc. of Puerto Rico, 699 F.3d 93, 104 (1st Cir. 2012). In short, whether ETS
 7 properly vacuumed the transformer (and whether the overall maintenance was adequate) is not
 8 “beyond dispute” here. As ETF has failed its burden on this front, this negligence determination
 9 is unamenable to disposition via summary judgment.

10 By like token, ETS’s causation argument — while legally sound, cf. Valle, 8 P.R. Offic.
 11 Trans. 735 at 739-40 — cannot be resolved at the summary judgment stage. That is so because
 12 causation questions (and the concomitant issue of foreseeability) are ordinarily for the jury. See,
 13 e.g., Marshall 828 F.2d at 850-51 & n. 8. And, as correctly argued by the plaintiffs, the question
 14 whether the transformer’s malfunction was the proximate cause of the spill does not “lead to
 15 but one conclusion.” Staelens v. Dobert, 318 F.3d 77, 79 (1st Cir. 2003).

16 The Court acknowledges that this is a close call: A jury may well agree with ETS’s
 17 arguments that “proximate cause is not proven if the defendant can show the occurrence of an
 18 intervening cause that was not foreseeable,” Wojciechowicz v. United States, 582 F.3d 57, 67
 19 (1st Cir. 2009), and that ETF’s alleged improper maintenance on the transformer was too remote
 20 in time and in place from the spill to hold it accountable. But, viewed in the light most favorable
 21 to the plaintiffs and drawing all inferences in their favor (as the Court must), a jury could also
 22 reach a contrary conclusion: That ETS’s involvement was remote neither in time nor in place

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 24 cured any such defects. See Maytag Corp. v. Electrolux Home Products, Inc., 448 F. Supp. 2d 1034
 25 (N.D. Iowa 2006), aff’d, 224 Fed. Appx. 972 (Fed. Cir. 2007) (finding that expert could cure an
 26 unsworn expert report by being deposed and restating in the deposition the opinions in the unsworn
 report). ETS’s other evidentiary challenges are also unpersuasive.

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2 from the spill, and that the “day tanks” and “Tramont panel” malfunctions were not intervening
3 causes. For instance, a jury could also find that components in large office buildings may
4 malfunction in tandem. The evidence here, “though thin, point[s] in different directions; that
5 is, it tend[s] to support conflicting inferences” Mandel, 456 F.3d at 207 (emphasis added);
6 see also, e.g., Putnam Res. v. Pateman, 958 F.2d 448, 460 (1st Cir.1992) (“When, as here, the
7 existence of proximate cause turns on an issue of superseding causation . . . the jury’s role may
8 be especially significant.”); Swift v. United States, 866 F.2d 507, 510 (1st Cir.1989)
9 (“Application of the legal cause standard to the circumstances of a particular case is a function
ordinarily performed by, and peculiarly within the competence of, the factfinder.”). Thus, ETS’s
10 request for summary judgment is unwarranted.
11

12 **Conclusion**

13 In sum, the evidence of record shows “conflicting yet plausible inferences” that make
14 summary judgment improper. Manganella v. Evanston Ins. Co., 702 F.3d 68, 73-74 (1st Cir.
15 2012). For these reasons, the motions for summary judgment are **DENIED**. Needless to say,
16 ETS’s request for attorney’s fees, whose success depends on the merits of ETS’s motion for
17 summary judgment, is also **DENIED**.

18 **IT IS SO ORDERED.**

19 In San Juan, Puerto Rico, this 19th day of June, 2013.

20 *S/ Salvador E. Casellas*
21 SALVADOR E. CASELLAS
U.S. Senior District Judge
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